It is true, however, that a preliminary objection had been taken that the affidavit verifying the petition was not sworn after but before the petition was filed. The learned judge recognized the weight of the objection because if an affidavit is sworn in such circumstances the person making it would not be guilty of perjury if the affidavit were false. An affidavit verifying the petition was, however, filed 12 days after but did not attempt to explain why the requisite affidavit verifying the petition was not filed within the proper time. In these circumstances, the learned judge made the chance and somewhat inconclusive remark — doubtless by way of obiter dictum — 'If however, that were the only other objection to the petition, probably the court might in some way or other get over the difficulty which the petitioner has created for himself by neglecting the rule.' As against this are the other authorities cited above, which take a contrary view and which I prefer to follow.

On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex p Hasluck*[6] is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Creditor's petition dismissed.

Solicitors: *Meena, Thayalan & Partners; Lim Kim Chuan & Co.*

Reported by *Zarinah Marican*

Bhanu Sekaramani v Nagamma

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S7-47-290 OF 1988
LIM BENG CHOON J
10 JANUARY 1991

Family Law — Divorce — Living apart for continuous period of two years — Two-year separation prima facie proof of breakdown of marriage — Law Reform (Marriage and Divorce) Act 1976, ss 53(1), 54(1) & (2)

This is a divorce petition instituted by the husband to dissolve the marriage solely on the ground that the husband and the wife have been living apart continuously for more than two years since October 1984 until the presentation of this petition. The respondent denied that the parties had been living apart for a continuous period of two years since October 1984. She believed that the husband had been committing adultery with an unknown woman.

Held, dismissing the petition:

(1) It is clear from s 53(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') that the court should have regard to the fact that the parties to a divorce petition have been separated for at least two years prior to the filing of the divorce petition. But the two-year separation is only prima facie proof of the breakdown of the marriage. It is rebuttable when the respondent can show that the two-year separation per se does not cause or lead to the breakdown of the marriage. This is so because of the wording of s 54(2) of the Act.

(2) Under paras (a) and (b) of s 54(1) of the Act, the commission of adultery by the respondent or gross misbehaviour on the part of the respondent is not per se sufficient ground for a divorce simply because the respondent may be able to show that the petitioner has condoned the adultery or misbehaviour and the court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree.

(3) Desertion per se under s 54(1)(c) is only prima facie proof of the fact that the marriage had broken down irretrievably; it is not conclusive but rebuttable.

(4) The two grounds relied on by the petitioner to support his allegation that the marriage had broken down irretrievably — that the wife refused to stay with him or stay in his parents' house and the wife scolded him and showed disrespect to him — would not be sufficient to justify that the marriage has irretrievably broken down, even if they were true.

[Bahasa Malaysia summary

Ini adalah satu petisyen perceraian yang dimulakan oleh suami untuk membubarkan perkahwinan atas alasan tunggal bahawa suami dan isteri telah tinggal berjauhan secara berterusan untuk lebih daripada dua tahun semenjak Oktober 1984 hingga penyampaian petisyen ini. Responden menafikan yang kedua-dua pihak telah tinggal berjauhan secara berterusan untuk dua tahun sejak Oktober 1984. Beliau percaya bahawa suaminya telah berzina dengan seorang wanita yang tidak dikenali.

Diputuskan, menolak petisyen itu:

(1) Adalah jelas dari s 53(1) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') bahawa mahkamah harus mengambil notis tentang fakta yang pihak-pihak kepada satu petisyen perceraian telah berpisah

untuk sekurang-kurangnya dua tahun sebelum pemfailan petisyen perceraian. Tetapi perpisahan dua tahun itu hanya bukti prima facie tentang kegagalan perkahwinan itu. Ia boleh dicabar apabila responden boleh menunjukkan bahawa perpisahan dua tahun itu secara sendiri tidak menyebabkan atau membawa kepada kegagalan perkahwinan itu. Ini adalah kerana perkataan s 54(2) Akta itu.

(2) Di bawah para (a) dan (b) s 54(1) Akta itu, perlakuan zina oleh responden atau kelakuan buruk yang melampau oleh responden dengan sendirinya tidak cukup untuk mengasaskan satu perceraian kerana responden mungkin boleh menunjukkan yang pembuat petisyen telah memaafkan perzinaan atau kelakuan buruk yang melampau itu. Mahkamah harus mempertimbangkan kelakuan dan keadaan kes untuk melihat sama ada wajar untuk memberikan dekri (decree) itu.

(3) Tinggal langsung (desertion) dengan sendirinya di bawah s 54(1)(c) hanya bukti prima facie tentang hakikat bahawa perkahwinan itu telah gagal dan tidak boleh diselamatkan lagi; ia tidak mutlak tetapi boleh dicabar.

(4) Kedua-dua alasan yang digunakan oleh pembuat petisyen untuk menyokong dakwaannya bahawa perkahwinan itu telah gagal dan tidak boleh diselamatkan lagi — bahawa isteri enggan tinggal dengannya atau tinggal di rumah ibubapanya dan bahawa isteri memarahinya dan tidak menghormatinya — tidak cukup untuk menunjukkan bahawa perkahwinan itu telah gagal dan tidak boleh diselamatkan lagi, biarpun alasan itu benar.]

Cases referred to

1 *Hariram Jayaram* v *Saraswathy Rajahram* [1990] 1 MLJ 114 (refd)
2 *Tan Keok Yin* v *Cheah Saw Hong* [1991] 2 MLJ 266 (refd)
3 *Stringfellow* v *Stringfellow* [1976] 2 All ER 539 (folld)
4 *Katz* v *Katz* [1972] 1 WLR 955; [1972] 3 All ER 219 (folld)
5 *Kisala* v *Kisala* (1973) 117 SJ 664; (1973) 4 Fam Law 90 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 53(1), 54(1)(a), (b), (c), 54(2)

T Santhakumari for the petitioner.
Rita Reddy for the respondent.

Cur Adv Vult

Lim Beng Choon J: The husband petitioner and the wife respondent (hereinafter referred to as 'the husband' and 'the wife' respectively) were married on 27 September 1984 and the marriage was registered under s 27 of the Law Reform (Marriage & Divorce) Act 1976 ('the Act') at the Registry of Civil Marriage, Gombak, Selangor Darul Ehsan. There are no children of the marriage.

On 19 April 1988 the husband instituted this divorce petition to dissolve the marriage solely on the ground that the husband and the wife have been living apart continuously for more than two years sometime since October 1984 until the presentation of this petition and that reconciliation attempts made between the husband and the wife at the Marriage Tribunal, Petaling Jaya had not been successful. Hence, the husband claims that the marriage has broken down irretrievably. In his petition the husband said that after the marriage and before he left his wife, both the parties lived and cohabited at No 12 Jalan 1B Selayang Baru, Batu Caves, Selangor. I take it that the house where the parties lived is the matrimonial home. He also said in his petition that after the husband had left the wife, the latter was and is still staying at the matrimonial home.

In opposing the husband's petition, the wife filed her answer on 27 September 1988. She denied that the parties had been living apart for a continuous period of two years since October 1984. She averred that she had conceived a child of the husband on or about March 1985 but suffered a miscarriage at the end of July 1985 when she was hospitalized at the General Hospital, Kuala Lumpur until 3 August 1985. The husband had visited her at the said hospital. Prior to the miscarriage, she was working as a factory hand in a furniture factory for a salary of $150 per month and she had to stop working due to the miscarriage. The place where the parties stayed was a squatter house which they shared with ten other people. In 1985, the exact date of which she could not remember, the wife found the photograph of a lady in the husband's diary. The husband quickly grabbed the photograph off the hand of the wife. She believed that the husband had been committing adultery with the unknown woman and from October 1985 the husband had intermittently lived with the said woman and his own wife. On 2 September 1988, the husband visited the wife and took her out to a hotel and had sexual relationship with her since it was not convenient to do so in the house with ten other people. The wife, therefore, asked that the husband's petition for divorce be dismissed with cost.

The wife filed an affidavit affirmed by her on 27 September 1988 to support her application for maintenance. In her affidavit, she reiterated substantially what she had said in her answer. She stressed that the husband and she had lived together in the squatter area until October 1985 when he left her to live with the unknown woman. However that may be, the husband still came to be with her intermittently.

In his affidavit in reply affirmed by him on 27 September 1989, the husband did not dispute any of the allegations made by the wife in her answer and her affidavit of 27 September 1988. In the said affidavit in reply, he merely set out the amount he received as his monthly salary and his monthly expenditure to counter the wife's claim for maintenance.

In dealing with the case of *Hariram Jayaram* v *Saraswathy Rajahram*,[1] at p 116 I had, in passing, suggested (without deciding) that in considering a petition of divorce, the court was required pursuant to s 53(1) of

the Act to enquire into the facts alleged as causing or leading to the breakdown of the marriage. I must admit that what I had said is not quite correct because what s 53(1) provides is that in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court will have regard to one or more of the facts stipulated in that section and one of the stipulated facts is 'that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.' It is clear from s 53(1) of the Act that the court should have regard to the fact that the parties to a divorce petition have been separated for at least two years prior to the filing of the divorce petition. But the two-year separation is only prima facie proof of the breakdown of the marriage. It is rebuttable when the respondent can show that the two-year separation per se does not cause or lead to the breakdown of the marriage. This is so because the following wording of s 54(2) of the Act relevant to the present case enjoins the court that 'in considering whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties... and that if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.' I have had an occasion to raise these propositions when I dealt with the case of *Tan Keok Yin* v *Cheah Saw Hong*.[2] Furthermore under paras (a) and (b) of s 54(1) of the Act the commission of adultery by the respondent or gross misbehaviour on the part of the respondent is not per se sufficient ground for a divorce simply because the respondent may be able to show that the petitioner has condoned the adultery or misbehaviour and the court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree. It is only under para (c) of s 54(1) of the Act that a petitioner stands on firmer ground to get a decree when he or she can show that the respondent has, without reasonable cause, deserted the petitioner for a period of two years prior to the filing of the divorce petition. Even then desertion per se is again only prima facie proof of the fact that the marriage has broken down irretrievably; it is not conclusive but rebuttable. The scope of para (c) of s 54(1) is similar to s 1(2)(b) of the English Matrimonial Cases Act 1973 and the scope of the pertinent English statutory provisions has been dealt with in *Stringfellow* v *Stringfellow*[3] where it was held that desertion per se without more is not a good ground to assert that a marriage has irretrievably broken down.

On the pleadings of the parties, I would be fully satisfied in holding that the husband had failed to make out a case that the marriage has irretrievably broken down. However, as the matter had gone on trial and both parties chose to give oral evidence I must scrutinize the evidence as a whole in order to find out whether the marriage indeed has irretrievably broken down.

It is important to note that in his oral evidence the husband gave two grounds to support his allegation that the marriage had broken down irretrievably, namely, (i) that the wife refused to stay with him or stay in his parents' house and (ii) the wife scolded him and showed disrespect to him. I am inclined to hold that these two grounds are not true, and even if they were true, it would not be sufficient to justify that the marriage has irretrievably broken down. I say so for the reasons as enumerated below.

From my scrutiny of the evidence as a whole I find as a fact that firstly, the marriage was not a match-making or arranged marriage by the parents of the husband or anybody. It was, if I may use the phrase, 'a love-match' marriage. Indeed the parties had been staying together for some time before they registered the marriage without the knowledge of the husband's parents. That being the case, it is incredible that the husband's love for his wife could have worn off within three months causing the husband to leave the wife in the matrimonial home. The reasons given by the husband in his evidence in his examination-in-chief were that the wife 'refused to come back with me (the husband) or follow me to my parents' house at Carey Island.' He also said that the wife chose to stay in Selayang Batu Caves and that she never showed any respect for him but instead scolded him. It is to be noted that the husband did not explain in what way the wife failed to show any respect for him; he merely said that his wife scolded him and even then he did not say why and how often such scolding took place. Arguments, scoldings and even quarrellings are no doubt negative attributes of any ordinary marriage life and such negative attributes are not by themselves sufficient to allege that it is intolerable to live with the wife. As regards the wife's refusal to follow him, the husband alleged (it should be observed) in the petition that after the marriage the couple lived and cohabited at No 12, Jalan B, Selayang Baru, Batu Caves, Selangor and it was also said in the petition that at the time of filing of the divorce petition the wife still stayed at the same address which, as I have said earlier, was the matrimonial home. That being the case I find as a fact that it is not the wife who refused to follow the husband but rather the husband deserted the wife and left her staying by herself at the matrimonial home.

Secondly, from the way the wife gave her evidence in a simple and straightforward way and the quality of her evidence, it is more probable that the husband was staying with her until October 1985 in the matrimonial home. She conceived a child of the husband in March 1985 but had a miscarriage towards end of July 1985

when she had to be hospitalized. The husband visited her at the hospital. After her discharge from the hospital the husband then left her in October 1985 without making any effort even to pay the hospital charges. The reason for leaving the wife was reasonably explained by the wife's evidence where she said that in 1985 she happened to find the photograph of an unknown woman in her husband's diary. The husband quickly grabbed the photograph off the hand of the wife. There is no doubt in my mind that it was upon the discovery of this photograph that the husband made up his mind to desert the wife in order to be free to forge a closer relationship, if not with the particular unknown woman, at least with other women. This proposition is corroborated by what the husband said in his evidence given under cross-examination. He was asked by counsel for the wife whether he had any other women friends. His answer was that he had many friends meaning that he had many women friends although he denied that he had a special girlfriend. The wife denied that the husband had wanted her to leave the matrimonial home. She asserted that even after leaving her in October 1985, the husband still came back to the matrimonial home to see her and stayed with her. On one occasion in 1988, the husband took the wife to a hotel to have sexual relationship with her. Her explanation that the husband took her to the hotel to have sexual relationship with her was that it was inconvenient to do so in the matrimonial home which the couple shared with ten other persons. Such an explanation cannot be said to be incredible.

The standard of the behaviour of the respondent which warrants the petitioner to say that he cannot reasonably be expected to live with the respondent has been illustrated in the case of *Katz* v *Katz*[4] at p 960:

> The standard is that he must behave in such a way that the petitioner cannot reasonably be expected to live with [him]. That is the test. It is for the judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down. To that extent, I agree with what Bagnall J said in *Ash* v *Ash* [1972] Fam 135. *The court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him.* In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot be reasonably be expected to live with him. (Emphasis is mine.)

Again in *Kisala* v *Kisala*[5] at p 665 Bagnall J said:

> ... when a respondent desired to plead that the marriage had not broken down irretrievably the common form denial of the petition did not achieve sufficient clarity. It was desirable where a respondent sought to rely on s 2(3) of the Divorce Reform Act 1969 that submission together with particulars of the positive case in support of that submission should be made in the answer. The wife's complaints about the husband were mere trivialities. Despite the reform of the divorce law it was not allowable for the court to dissolve a marriage simply because of one party's disinclination and boredom with the marriage. Petition dismissed.

In applying the principles laid down in the two cases cited above, I am satisfied that the husband's complaints about the wife were trivialities. To my mind he wants the marriage to be dissolved not because of any misbehaviour on the part of the wife but rather because he is tired of the wife and bored and he wants to be free so that he can forge a closer relationship with the unknown woman or his other lady friends. Under the circumstances, I do not think that the marriage has irretrievably broken down. There is good prospect that the husband may, after reconsidering the matter, return to the wife. The petition for divorce is therefore dismissed with costs.

Petition dismissed.

Solicitors: *Seelan & Santha; Rita R Reddy & Associates.*

Reported by *Zarinah Marican*